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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1997

DANIEL SCHAEFFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the search of the Petitioner's vehicle was done pursuant to a valid inventory search and therefore all evidence seized in that search was inadmissible.

United States v. Marshall, 986 F.2d 1171, 1173 (8th Cir. 1993).
South Dakota v. Opperman, 428 U.S. 364, 376 (1976).
Colorado v. Burtine, 479 U.S. 367, 376 (1987).

II. Whether the denial of Petitioner's theory of defense jury instruction for entrapment was clearly erroneous and an abuse of discretion.

Matthews v. United States, 485 U.S. 65 (1988).
United States v. Heathershaw, 81 F.3d 765, 769 (8th Cir. 1996).
United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997).
United States v. Gullickson, 982 F.2d 1231, 1235 (8th Cir. 1993).

III. Whether the trial court committed clear error and an abuse of discretion in admitting "other act" evidence regarding firearm possession by Petitioner where the Petitioner was not charged with any crime related to use or possession of a firearm.

United States v. Logan, 54 F.3d 452, 454 (8th Cir. 1995).
United States v. Figueroa-Lopez, 125 F.3d 1241, 1245 (9th Cir. 1997).

IV. Whether the trial court clearly erred in determining that four level sentencing enhancement was appropriate for Petitioners alleged use of a firearm in that offense and for alleged obstruction of justice and that a base offense level of 32 was appropriate in light of the alleged drug quantity.

United States v. Crosby, 96 F.3d 1114 (8th Cir. 1996).
United States v. McLaughlin, 126 F.3d 130, 140 (3rd Cir. 1997).
United States v. Reyes, 979 F.2d 1406, 1410-11 (10th Cir. 1992).
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The Petitioner, Daniel Schaeffer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on May 21, 1998.

OPINION BELOW

The judgment of the United States District Court for the District of South Dakota, Western Division (United States of America v. Daniel Ross Schaeffer, J.) has not been reported. It is reprinted in the appendix hereto, p. 8a, infra.

JURISDICTION

Petitioner, Daniel Schaeffer, was found guilty after a jury trial of conspiracy to distribute controlled substance in violation of 21 U.S.C. § § 841 (a)(1), and 846. He was sentenced to a term of 188 months imprisonment and 5 years of supervised release by the Honorable Richard H. Battey, United States District Judge for the District of South Dakota, Western Division.

The United States Court of Appeals for the Eighth Circuit affirmed in a published
opinion filed May 21, 1998. [No petition for rehearing was sought.]

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

21 United States Code, §. 841(a)(1).
21 United States Code, §. 846.

Federal Rules of Evidence, Rule 104.
Federal Rules of Evidence, Rule 403.

Federal Rules of Evidence, Rule 702.
United States Sentencing Guidelines, §. 2D1.1(b)(1)
United States Sentencing Guidelines, §. 3C1.1.

STATEMENT OF THE CASE

Daniel Ross Schaeffer, Petitioner, was indicted by a Federal Grand Jury in Rapid City, South Dakota, for conspiracy to possess with intent to distribute, and to distribute methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1). He was tried and found guilty by a jury and was sentenced to 188 months of confinement.

Schaeffer is a 41 year old adult male, who is a divorced father of two teenage sons. He was the owner and operator of a business called Schaeffer Trucking in Rapid City, South Dakota. His primary business was a subcontractor doing demolition work.

Schaeffer was accused of having purchased and distributed methamphetamine to certain unnamed persons, allegedly including his employees at work. The allegations were that Schaeffer participated in a drug conspiracy by obtaining methamphetamine from a California contact, namely Dennis Satterfield, and then distributing the drugs to local residents in South Dakota. Schaeffer denied any knowledge of a conspiracy to distribute any type of controlled substance. He also denied ever knowing a person by the name of Dennis Satterfield. There was no evidence of any direct dealings between Schaeffer and Dennis Satterfield during the entire time alluded to in the indictment, except for statements and testimony offered by High Eagle at the time of trial, which indicated that Schaeffer obtained 1/8 an ounce of methamphetamine from Satterfield while on a one-time trip to California, and that such drugs were obtained for "partying" purposes.

On February 18, 1995, Doug Ketterling, United Parcel Service employee, called South Dakota Highway Patrol Trooper John Boersma because he had discovered a suspicious looking package that had arrived at the Rapid City, South Dakota UPS office. Ketterling opened the cardboard

box which was addressed to "Shiffer Trucking" at 1140 Rand Road, Rapid City, South Dakota. When he opened the package he found it was a sealed coffee can surrounded by coffee grounds. When Trooper Boersma arrived, he went through a process using a drug-sniffing dog in an attempt to establish probable cause to obtain a search warrant to open the contents of the coffee can which was contained within the already broken sealed cardboard box. Boersma then used the information derived from his examination and investigation to obtain a search warrant from a local Magistrate Judge. After obtaining the search warrant, Boersma opened the coffee can container and discovered that it contained methaphetamine. Boersma then alerted the Drug Task Force, and in particular, DTF Agent John Wenande.

The law enforcement officials removed the entire contents of the coffee can and separated the majority of the substance found in the can, leaving a small amount of the methamphetamine within the can container, and the cardboard box was resealed and an attempt made to make it resemble its original outward appearance. DTF Agent Deb Cady then made a telephone call to the business which was located at 1140 Rand Road in Rapid City, South Dakota. Cady lied and concealed her position as a law enforcement official by indicating to the person answering the phone, that she was a UPS official wanting to deliver a package that was undeliverable. The address at 1140 Rand Road was actually a business called TSS. An employee of TSS answered the phone and took a message that the package could be picked up on February 20, 1995, between the hours of 12:00 noon and 2:00 P.M..

The DTF agents staked themselves out outside and within the Rapid City UPS office in an attempt to observe and apprehend the intended recipient of this package. The intended recipient and admitted drug dealer, High Eagle, drove to the Rapid City UPS office at about 12:17 P.M. and

went inside to retrieve the package which was addressed to Shiffer Trucking. Previously, High Eagle had received a call from TSS employee and given the message left by a UPS official (actually DTF Agent Cady). Prior to February 20, 1995, High Eagle had specifically told TSS employee Dill, that Dill or any TSS employee should call High Eagle at his phone number in an event a package comes in for Schaeffer Trucking.

High Eagle arrived at the UPS office driving his Harley Davidson motorcycle. High Eagle entered the UPS office under the surveillance of DTF agents and other law enforcement officials, and picked up the package. He signed the name "Daniel Schaeffer" on the UPS log sheet. High Eagle had no verbal or written consent to use or forge the signature of Daniel Schaeffer at this or any other time prior to February 20, 1995. High Eagle then left with the package. He went to a local bar, became paranoid, and tore off the original label (indicating "Shiffer Trucking", 1140 Rand Road, Rapid City, South Dakota). High Eagle then left the bar became involved in a high speed chase with the police, and was eventually caught.

High Eagle implicated Schaeffer as his partner in a drug conspiracy by indicating that Schaeffer would always get a portion of the drugs High Eagle received from Satterfield. Therefore, Schaeffer became an immediate target of suspicion and target of investigation for DTF officials. An elaborate ploy was set into motion to entrap Schaeffer.

In Short, High Eagle called Schaeffer, they met at the Valley Sports Bar, and spoke for about 5 minutes. This conversation was allegedly being monitored, however, the background noise of the video lottery machine basically drowned out any intelligible record of what was actually said between Schaeffer and High Eagle inside the bar. After speaking in the bar Schaeffer and High Eagle walked outside and High Eagle placed the package in Schaeffer's pickup cab.

Schaeffer then left the bar, began driving back to work and was pulled over by police with their guns drawn.

Schaeffer immediately got out of the car and put his hands behind his head as instructed. At least six, and possibly as many as nine or ten other DTF and law enforcement officials arrived at the scene within seconds. Wenade (DTF Agent) went to the pickup truck Schaeffer was driving and immediately got inside and seized the UPS cardboard box containing approximately one ounce of methamphetamine. It is unclear which of the other DTF agents did so, but some other DTF agent also got into the cab of the pickup truck at the scene of the vehicle stop, and searched under the seat and behind the seats. Meanwhile, Schaeffer had been handcuffed and placed into Wenande's unmarked patrol vehicle for transportation down to the Rapid City DTF office which was only minutes from the vehicle stop sight. Cady, without the knowledge and consent of Schaeffer, got into the pickup truck and drove the pickup truck down to the DTF office in downtown Rapid City. No attempt was made to inventory the vehicle or its contents at the scene of the vehicle stop or incident to Schaeffer's detention for possession of a controlled substance. Instead, DTF officials intentionally and purposefully wanted to shield their activities and dealings with Schaeffer as a result of this vehicle stop, and detention, by taking him to the DCI office for an "interview" with Wenande which was a blatant attempt to get Schaeffer to "rollover" and cooperate with them.

Schaeffer was transported downtown by Wenande and was taken to an interview room at the DCI office. Wenande, persisted in aggressively interrogating Schaeffer at the DTF office in an attempt to get him to "rollover" and cooperate. Wenande testified that no audio recording was made of this interview despite the fact that audio tapes are repeatedly and continually used in these circumstances in drug cases. Schaeffer indicated and testified that a tape recorder was

placed in front of him during the time of the interrogation at the DTF office by Wenande and the others. None were produced at trial.

Schaeffer was in custody for approximately 45 minutes, and then released without being charged. While Schaeffer was being aggressively interrogated, the pickup truck he had been driving, had been driven to the unsecured and open parking lot beside the DTF office building. This particular lot is beside the building which houses the DTF office and is not owned or controlled by DTF or its agents in any fashion or form. This is not an impound lot nor is it secured in any fashion. It was in this lot, that Boersma, Cady, and Agent Thom performed an investigatory search of the pickup truck without the knowledge or consent of Schaeffer.

No arrest warrant had been issued for Schaeffer at this time, and no search warrant was obtained to search either the person or property of Schaeffer, including the vehicle he was driving that day. However, even the agents did not know who or what directed them to seek an alleged "inventory" search of the vehicle at that particular time. This search was carried out whereby the agent got into the cab and searched under the seats, behind the seats, in the glove compartment, and even within closed containers. These items were clearly not in plain view. Many items of personal property were found and seized as a result of the search performed at this unsecured lot. The agents did fill out a property (inventory) form whereby the items seized and removed from the interior of the pickup truck were recorded.

The interview of Schaeffer continued for at least a half hour and was ongoing during the search performed by the agents at the DTF office. Periodically, during the interrogation of Schaeffer, the DTF agents, including Cady and Thom, produced items of personal property to Wenande and Schaeffer in the interview room, indicating that these items were removed from the truck and that they would be

used as evidence against Schaeffer. These personal property items were never returned to Schaeffer or the vehicle, and remained in the custody of the DTF and law enforcement officials. Schaeffer was directed to sign off on the "inventory" form indicating that he had reviewed the form.

No forfeiture proceedings were ever initiated against Schaeffer or the vehicle subject to the vehicle stop at any time. The vehicle was never impounded. No search warrant was ever obtained or sought to search Schaeffer's person or the vehicle Schaeffer was driving that day. No search warrant was ever obtained or sought to search Schaeffer's home residence, nor his personal business, Schaeffer Trucking.

When Schaeffer succumbed to the pressures and tentatively agreed to cooperate, he was commanded to return to the DTF office by 10:00 A.M. the next morning. Schaeffer left in his pickup truck and never returned to the DTF office the next morning. It was not until November 21, 1996, that a formal Grand Jury indictment was returned charging Schaeffer with one count of conspiracy to distribute a controlled substance. A formal arrest warrant was then issued on November 25, 1996, and Schaeffer was soon thereafter, formally arrested for the first time for this offense.

Schaeffer made his first appearance on November 27, 1996, and entered a plea of not guilty. A standing order for discovery and other matters was issued by the court. A suppression hearing was initially scheduled for March 19, 1997, based upon motions to suppress physical evidence and Schaeffer's statement. The court issued a preliminary order denying the motions to suppress. A second motion to suppress physical evidence was then subsequently filed and another suppression hearing was scheduled for July 17, 1997. DTF agent Wenande and Trooper Boersma testified at this suppression hearing. The crux of the motion by Schaeffer challenged the validity of the alleged inventory search by the DTF agents of the pickup truck on February 20, 1995. The

Magistrate Judge ultimately denied the motion to suppress and Schaeffer filed objections thereto. The District Court then accepted the report and recommendations of the Magistrate Judge and denied the motion to suppress physical evidence. A jury trial was then held on August 19-22, 1997 in District Court.

Cady was allowed, by leading questions of government counsel, and against repeated objection by Schaeffer, to testify about prior "bad act" or bad character evidence implicating that the use or possession of firearms by Schaeffer or the fact firearms were found in the pickup truck when Schaeffer was detained on February 20, 1995, was an indicator and implication that he was a drug dealer. This evidence created a bad character reference and was a blatant attempt by the government to introduce evidence of a propensity to commit a crime or to be a drug dealer of a part of a drug conspiracy, and was highly prejudicial. Despite the prejudicial nature of the admission of firearm testimony against Schaeffer, over objection, the trial court sustained the government's objections when Schaeffer attempted to inquire about confidential informant High Eagle's use and possession of firearms, which under those circumstances, would have been a violation of High Eagle's parole and plea agreement, which was highly relevant and a matter of credibility and bias by the government.

Prior to trial and again prior to the settling of jury instructions, Schaeffer offered seven proposed jury instructions, all of which were refused by the court. Schaeffer proposed an "entrapment theory of defense" instruction in both the pretrial instructions and the jury instructions themselves, both of which were refused by the court. Therefore, Schaeffer was strictly prohibited from presenting his defense theory of entrapment by the government on February 20, 1995 when the plan and "ploy" was setup by Wenande and government informant High Eagle to get

Schaeffer to take physical possession of the UPS box (which had been altered and substantially emptied by the government) so he could be detained, and then pressured into "rolling over" on others, which Wenande hoped would include members of the Banditos motorcycle gang.

To indicate the jury's serious difficulty with the process of determining guilty or innocence based upon the jury instructions, the jury sent a note asking about the fingerprint stipulation and if any fingerprints of Schaeffer were found on any items seized, and the jury asked for Wenande's police report, obviously questioning Wenande's and High Eagle's credibility.

Schaeffer was ultimately found guilty and was immediately placed in custody of the United States Marshall Pending sentencing. Schaeffer was sentenced on November 25, 1997, to 188 months incarceration. The court applied a base offense level of 32, indicating that the amount of drugs attributed to this conspiracy was in the amount of 219.95 grams, despite Schaeffer's objections and recommendations to apply the lesser amount in the range of 28 to 44 grams which was the actual amount of the 50% cut-mix methamphetamine found in the cardboard box at the time of the vehicle stop on February 20, 1995. The sentencing court further committed clear error and abuse of discretion when it punished Schaeffer by enhancing and sentencing range and offense level by 2 points for obstruction of justice indicating that Schaeffer, in fact, committed perjury when he testified in his own defense at trial. Once again, Schaeffer objected. The trial court finally further punished Schaeffer by enhancing the offense level by 2 points for use of a firearm during the commission of the underlying offense. Schaeffer once again objected. Sentence was imposed and Schaeffer was returned to jail. Schaeffer filed a timely notice of appeal to the Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed his conviction.

REASONS FOR GRANTING THE WRIT

I. THE SEARCH OF THE PETITIONER'S VEHICLE WAS NOT DONE PURSUANT TO A VALID INVENTORY SEARCH AND THEREFORE ALL EVIDENCE SEIZED IN THAT SEARCH WAS INADMISSIBLE.

Shaeffer argues that law enforcement officials, including DTF agents, Wenande, Cady, Thom and members of the South Dakota Highway Patrol, unlawfully seized physical evidence on February 20, 1995, from the interior of Schaeffer's pickup truck which was ultimately used at trial to convict Schaeffer of conspiracy to distribute methamphetamine. Schaeffer argues that the search and seizure of this physical evidence was in violation of Amendment IV, V, VI and XIV, of the United States Constitution and the Constitution of the State of South Dakota, Article 6, §11. The facts giving rise to the alleged "inventory" search of Schaeffer's pickup truck at the DCI/DCF parking lot on February 20, 1995 between the time of 3:40 P.M. and 4:20 P.M., are contained within the Statement of the Case referenced earlier in the petition which indicates precise citation to the record. Petitioner will not repeat this information verbatim but will reference the relevant facts leading into said argument on this issue.

It was at the point of the vehicle stop, that the DTF agents acted in concert to carry out their unwritten plan or policy in an attempt to get Schaeffer to "roll-over" and cooperate with them so that they may learn more about other drug suspects, drug users or drug dealers. As part of this plan and policy, the DTF agents need to covertly obscure the public from the activity involved in the detention itself so that the DTF can perform their "rollover" and intimidation tactics against the suspect, in relative privacy and secrecy.

In fact, these tactics were employed so that, as potentially incriminating evidence (property) was obtained from the vehicle parked in the lot, pursuant to the "inventory" search, those pieces of evidence were presented to Wenande and the other agents during their interrogation/interview of Schaeffer at the DTF office. It is clear that the police tactic in this regard at this particular time, were designed to furnish a means of discovering incriminating evidence as leverage and pressure to get Schaeffer to "rollover" and agree to cooperate so the DTF could get other drug suspects, users and potential dealers.

The members of the DTF and highway patrol involved with the vehicle search on February 20, 1995, acknowledged that there was a state implemented inventory search policy and procedure in existence. This vehicle inventory search protocol is found in § 9.11 of the South Dakota Highway Patrol manual. (Index 8-9).[1]

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[1] 9.11-Vehicle Inventory Searches

An inventory is a procedure used to identify and list property that may be located in a vehicle which is to be impounded or otherwise taken into police custody. In South Dakota v. Opperman, the U.S. Supreme Court held that it was permissible for officers to conduct such an inventory. Subsequent state court decisions have made it clear that police should not impound a vehicle as a pretext to conduct an investigatory search under the guise of an inventory.

The purposes for conducting inventory searches are: (1) to protect the owner's property while it remains in patrol custody; (2) to protect the officers of the Highway Patrol and the State of South Dakota from claims or dispute over alleged lost or stolen property; (3) to protect officer(s) from the potential danger of thieves entering the vehicles and stealing property contained therein; and (4) to determine whether the vehicle is stolen, and if so, to learn the identity of the owner.

In the State of South Dakota v. Flittie (1988), the Supreme Court has modified its holding in State v. Opperman. The Court now holds, "that so long as there is a good faith, non investigatory inventory

When Schaeffer's vehicle was stopped on February 20, 1995, he was immediately arrested. Without his consent or knowledge, the pickup truck was driven to an unsecured parking lot not owned or controlled by the DTF or law enforcement, and was vigorously searched and rummaged through while Schaeffer was being interrogated and intimidated upstairs at the DTF office. Two DTF agents entered the pickup at the scene of the stop and removed the UPS box from the vehicle at the scene. No arrest warrant had been issued nor executed at any point in time prior to November 20, 1996. There were actually two searches of the vehicle that day. The search incident to the brief detention at he vehicle stop scene (box seized, and a brief look taken behind the seats and under the seats but no seizure except for the box). The second search was classified by DTF as an alleged "inventory" search at the parking lot beside the DTF building. Boersma and Cady were never advised to specifically do an inventory search or to pursue forfeiture of the truck. Boersma merely acted upon an "assumption" and nothing more. Neither the truck or any of Schaeffer's personal or real property were seized or forfeited by the DTF or law enforcement at anytime, except the personal property seized from the parking lot search on February 20, 1995.

The parking lot search was not in accordance with standard policy. The policy states that it applies to vehicles "which are to be impounded or otherwise taken into police custody."... Further and most importantly, the policy states, "police should not impound a vehicle as a pretext to conduct an investigatory search under the guise of an inventory

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search conducted pursuant to reasonable, standardized and uniform policies, it (inventory) need not be restricted to articles which are within plain view of the officer's vision." The burden of proving the property and the impoundment and the legitimate nature of an inventory search rests upon the officer and the prosecution...

search." Actually, in this case there was no impoundment for an inventory assessment.

Review of the decision on the Motion to Suppress is reviewed de novo. See United States v. Hogan, 25 F.3d 690, 692 (8th Cir. 1994). In South Dakota v. Opperman, the Supreme Court defined what has become known as the "inventory exception" when it held that the police may lawfully conduct a warrantless search of an impounded automobile that is designed to produce an inventory of the vehicle's contents. South Dakota v. Opperman, at 428 U.S. 364, 376 (1976). Thus, in the court's view, the central inquiry is whether the inventory search is reasonable under all the facts and circumstances of the particular case. United States v. Marshall, 986 F.2d 1171, 1174 (8th Cir. 1993), citing Opperman at 373; also citing Coolidge v. New Hampshire, 403 U.S. 443, 509-510 (1971); United States v. Spencer, 884 F.2d 360, 361 (8th Cir. 1989). Using this analysis, the Supreme Court has concluded that inventory searches conducted according to standardized police procedures, which vitiate concerns of an investigatory motive or excessive discretion, are reasonable. Marshall, at 1174, citing Opperman, 428 U.S. at 372; Colorado v. Bertine, 479 U.S. 367, 376 (1987); Florida v. Wells, 495 U.S. 1, 4 (1990).

> "...the court had identified substantial reasons for inventorying the contents of an impounded vehicle:" the protection of the owners property while it remains in police custody; the protection [of] police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." Marsall at 1174 citing Opperman at 369; Bertine, at 372-73; United States v. Davis, 882 F.2d 1334, 1339 (8th Cir. 1989).

In finding that the purpose of searching the mini van in Marshall, was to find evidence of criminal activity, the Supreme Court reversed the conviction and remanded to the district court with directions to enter a judgment of acquittal, stating:

> "An inventory search is not constitutionally reasonable, however, merely becauseserves important governmental interests. To pass constitutional muster, the search it must also be conducted pursuant to standard police procedures." [citing] United States v. Davis, 882 F.2d at 1339. The requirement of standardized procedures serves to remove the inference that the police have used inventory searches as "a purposeful and general means of discovering evidence of crime." [citing] Bertine, 479 U.S. at 376(Blackman, J., concurring). The requirement that standardized criteria or established routine exists as a precondition to a valid inventory search "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." [citing]

Florida v. Wells, 495 U.S. at 4. Stated another way the police may not raise the inventory-search banner in the end after-the-fact attempt to justify what was, as in the present case, in fact purely and simply a search for incriminating evidence Marshall, at 1175.

Under the Fourth Amendment, the propriety of inventory searches is judged by the standard of reasonableness. United States v. Porter, 859 F.2d 83, 84 (8th Cir. 1988), citing United States v. Woolbright, 831 F.2d 1390, 1394, (8th Cir. 1987). Most of the authorities upholding inventory searches of vehicles commonly deal with the vehicle being impounded,

the driver abandoned or there is no alternative but to tow or remove the vehicle to an impoundment lot. See Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Lewis, 3 F.3d 252, 254 (8th Cir. 1994); United States v. Agofsky, 20 F.3d 252, 254 (8th Cir. 1994); California v. Acevedo, 111 S.Ct. 192 (1991); United States v. Spencer, 884 F.2d 360 (8th Cir. 1989); United States v. Martin, 982 F.2d 1236 (8th Cir. 1993); but see United States. v. Johnson, 936 F.2d 1082 (9th Cir. 1991); United States v. Colon Osorio, 877 F.Supp. 771, 777 (D. Puerto Rico 1994).

This search and seizure at the parking lot near the DCI-DTF office cannot be classified under the automobile exception of United States v. Ross, 456 U.S. 798 (1982) nor the search incident to arrest exception established in New York v. Belton, 453 U.S. 454 (1981), which describes that when a policeman made a lawful custodial arrest of the occupant of an automobile he may, as a contemporaneous incident to the arrest search the passenger compartment of the vehicle and may also examine the contents of any container, if capable of holding of another object, may be searched whether it is open or closed. The search of Schaeffer's pickup truck was not performed at the scene of the stop and was not done incident to or contemporaneous with any detention or arrest. "Where such container is not searched immediately but is taken to the police station and searched later, a warrant is required." United States v. Burnette, 698 F.2d 1038, 1046-50 (9th Cir. 1983); United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981). No clear non discretionary policy or procedure existed to allow the DTF agents the unfettered ability to disregard the Fourth Amendment and perform a full blown purely investigatory, search of Schaeffer's vehicle without a warrant. Applying the Porter reasonableness standard, it is clear in this case that this was not an inventory search. Government agent's used this exception to the warrant requirement to disguise their true intent. They needed the

evidence to make this trumped up bust stick. This is especially true given the absence of any impoundment of the car.

The purposes of the inventory search policy were not met or established in this case. Schaeffer's personal property or personal property located in the truck was never out of the sight or dominion of law enforcement officials from the point when Schaeffer was stopped until he was released 45 minutes later. The District Court's finding that his presence at the DTF office was approximately 2 hours is clearly erroneous.

A very telling portion of the inventory search policy is the provision describing that, "so long as there is a good faith, non-investigatory inventory search conducted pursuant to reasonable, standard and uniform policies,"... However, no written, standardized or uniform policies exist for DTF or highway patrol for forfeiture matters. No written, standardized or uniform policies exist for circumstances where an alleged drug suspect is briefly detained, forced to cooperate, then is released in less than one hour. Contrary to the testimony of the DTF agents, there is no written standard or uniform policy for actually opening closed containers, (luggage boxes) without consent or a search warrant, found within the inventory search policy in § 9.11.

The search at the parking lot, was purely investigatory in nature and was carried out with no other purpose than to seek out and gather incriminating evidence which could be immediately used by Wenande during the interrogation of Schaeffer to get him to cooperate. Therefore, the vehicle search was not a valid inventory search as the District Court concluded. This is ample grounds by itself for this Court to issue the Writ.

II. THE DENIAL OF PETITIONER'S THEORY OF DEFENSE JURY INSTRUCTION FOR ENTRAPMENT WAS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION.

Schaeffer felt all along that the was the victim of an elaborate scheme and setup whereby DTF agents, in particular, Wenande, and governmental informant High Eagle, arranged to have Schaeffer possess the less than one ounce of 50 percent cut mix methamphetamine contained within the UPS box which was placed into Schaeffer's pickup truck at the Valley Sports Bar, by High Eagle. Schaeffer offered proposed jury instructions at the pretrial stage and then again at the settling of jury instructions at the end of the evidence. However, the Trial Court denied Schaeffer even an opportunity to have entrapment mentioned in jury selection, opening argument, closing argument and in the instructions to the jury. Schaeffer argued that entrapment was a theory of defense that was a key to his case, and that the court's denial of the entrapment instruction denied him a fair trial. Schaeffer argues that the jury was not able to consider entrapment as a legal defense and therefore were easily convinced to follow the law contained in the instructions, which were seriously slanted in favor of the government.

The United States Supreme Court dealt with a similar issue in Matthews v. United States, 485 U.S. 65 (1988) where the court held that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. Matthews, at 886. The Court went on to state that:

> "... a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant

> to engage in the criminal conduct. [cites omitted]. Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetuate the crime. [cites omitted] The question of entrapment is generally one for the jury, rather than for the court..." Matthews, at 886.

"As a general proposition, a defendant is entitled to an instruction as to any recognized offense for which there exists evidence sufficient for a reasonable jury to find his favor." [cite omitted] Id. at 887. Federal appellate cases also permit the raising of inconsistent defenses. [citing] Johnson v. United States, 426 F.2d 651, 656 (1970). Id. at 887. See also, Sorrells v. United States, 287 U.S. 435 (1932).

The same reasoning found in Matthews v. United States, is also accepted in the Eighth Circuit Court of Appeals that, "a defendant is entitled to an instruction on any recognized offense on which there is sufficient evidence for a jury to find in his favor." United States v. Brown, 33 F.3d 1002, 1004 (8th Cir. 1994); United States v. Heathershaw, 81 F.3d 765, 769 (8th Cir. 1996). See also, United States v. Becerra, 922 F.2d 960 (9th Cir. 1990) (conviction reversed for failure to give entrapment instruction).

Entrapment may take different forms, including pressure, assurance that a person is not doing anything wrong, "persuasion, fraudulent representations, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship." Jacobson v. United States, 112 S.Ct. 1535, 1542-43 (1992); United States v. Mendoza-Salgado, 964 F.2d 993, 1004 (10th Cir. 1992); see also, United States v. Gullickson, 892 F.2d 1231, 1235 (8th Cir. 1993) (entrapment a question for the jury). Further, "[E]ven if only weak evidence supports the requested instruction, it is

reversible error in a criminal case not to give an adequate presentation of a theory of defense." United States. v. Frost, 125 F.3d 346, 372 (6th Cir. 1997). See also United States. v. Lewis, 987 F.2d 1349, 1353 (8th Cir. 1993).

In the case at hand, Schaeffer was entitled to entrapment as a matter of law. Id. There was certainly enough evidence in the record and before the jury, that if the jury were to believe and if the jury were allowed to consider entrapment as a defense, could reasonably result in a jury finding in Schaeffer's favor on the theory of entrapment. If so, Schaeffer would not have been convicted, instead, he would have been acquitted.

The entrapment instruction should have been given and it was clear error by the court not to give it. The trial judge simply misstated the law by not following Matthews and Sorells and therefore Schaeffer's conviction must be reversed. Therefore, the Court should grant the Writ.

III. THE TRIAL COURT COMMITTED CLEAR ERROR AND AN ABUSE OF DISCRETION IN ADMITTING OTHER ACT EVIDENCE REGARDING FIREARM POSSESSION BY PETITIONER WHERE THE PETITIONER WAS NOT CHARGED WITH ANY CRIME RELATED TO USE OR POSSESSION OR A FIREARM.

At trial, Agent Cady was allowed to testify about the firearm she recovered from the investigatory search performed at the DCI office on February 20, 1995, as well as being allowed to testify, over the objection of Schaeffer, that possession and ownership of firearms was a strong indicator that the person was a significant drug dealer or trafficker. This evidence was extremely prejudicial to Schaeffer in that it created an inference and innuendo to the jury by the mere fact that Schaeffer possessed and used firearms, which were

legally permitted, and for which he faced no state or federal crime for the possession and use thereof. The trial court did absolutely nothing to negate this negative and highly prejudicial inference created by allowing this testimony before the jury.

The standard of appeal of an evidentiary rule of this nature is abuse of discretion. In United States v. Logan, 54 F.3d 452, 454 (8th Cir. 1995), the court dealt with a similar issue but recognized the fact that the balancing test needed to be applied between the probative value versus the risk of unfair prejudice equated with introduction of firearm testimony. Schaeffer's contention is that the firearms should have never been introduced at all, because the search of the vehicle was invalid. However, in light of the ruling from the court denying the motion to suppress, Schaeffer objected to the introduction or inference raised by Cady's testimony at trial which equated bad character and a propensity to be a drug dealer by virtue of Schaeffer's possession of firearms on February 20, 1995. See Logan, at 454; United States v. Watson, 953 F.2d 406, 409 (8th Cir. 1992); Fed. R.Evid. 403; United States v. Emanuel, 112 F.3d 977 (8th Cir. 1997).

Due to the fact that the court offered no curative instruction on this matter to help negate the prejudicial effect to the jury, Schaeffer was denied a fair trial, and the court committed both plain and clear error as well as abuse of discretion, so the Writ should be granted.

No adequate foundation was laid for this damaging and prejudicial testimony from Cady. She was not qualified as an expert, nor was Schaeffer fairly appraised of the nature of the prejudicial effect See Fed. R. Evid. 104 and 702. Schaeffer's objections should have been sustained and the testimony stricken at the very least. But the court even failed to give a curative instruction. See United States v. Figueroa-Lopez, 125 F.3d 1241, 1245 (9th Cir. 1997).

IV. THE TRIAL COURT CLEARLY ERRED IN DETERMINING THAT A FOUR LEVEL SENTENCING ENHANCEMENT WAS APPROPRIATE FOR PETITIONER'S ALLEGED USE OF A FIREARM IN THE OFFENSE AND ALLEGED OBSTRUCTION OF JUSTICE AND THAT A BASE OFFENSE LEVEL OF 32 WAS APPROPRIATE IN LIGHT OF THE ALLEGED DRUG QUANTITY.

A. FIREARM ENHANCEMENT

The trial court at the time of sentencing, agreed with the motion of the government to enhance the defendant's base offense level of 32, by 2 additional points for the fact that firearms were discovered in the pickup truck at the time of the vehicle stop and investigatory search performed on Schaeffer's vehicle on February 20, 1995. However, the trial court made no specific or clear and separate findings of fact or conclusions, sufficient to support this particular enhancement under the Federal Sentencing Guidelines. "Under Federal Sentencing Guidelines § 2D.1(b)(1), an increase of 2 levels to a person's base offense level for some drug related crimes arises when "a dangerous weapon was possessed." United States v. McCraken, 110 F.3d 535, 541 (8th Cir. 1977), citing United States v. Payne, 81 F.3d 759, 763 (8th Cir. 1996). Application note 3 to the guidelines explains that, "the enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The government bears the burden of proving by a preponderance of the evidence that the weapon was present and that it is probable that the weapon was connected with the drug charge. McCracken, at 541.

Schaeffer vehemently objected to the 2 point enhancement and the findings of the court that the possession

of firearms was related to the allegation for which he was convicted at trial. In line with Schaeffer's entrapment defense, but for the entrapment scheme and the resulting vehicle stop and invalid investigatory search, no firearms would have ever come into play. The firearms were legally permitted. Schaeffer had absolutely no time under the circumstances to reasonably consider or deduct how firearms could be used for the commission of a drug offense in this scenario. Therefore, the trial court sentence based upon this 2 point enhancement should be reversed in that it is clearly erroneous and not supported by the appropriate factual findings and conclusions by the court.

B. DRUG QUANTITY AMOUNT ENHANCEMENT

The trial court clearly erred in accepting the presentence report (PSR) which set the base level of this offense at 32 based upon the alleged drug amount of 219.95 grams, which was the amount of 50% cut-mix methamphetamine found in the UPS box on the date of its arrival at the UPS office, and not the 29.83 grams that were actually in the UPS box when the box was delivered into the possession of Schaeffer on February 20, 1995. Schaeffer properly and timely objected to the drug quantities and the base offense level which was set by the PSR. The trial court failed to make the appropriate and necessary findings on the contested issues of material fact as concerning the drug quantities involved in this case. United States v. Randolph, 101 F.3d 607, 609 (8th Cir. 1996); United States v. Rogers, 982 F.2d 1241, 1245-46 (8th Cir. 1993); United States v. Reyes, 979 F.2d 1406 (10th Cir. 1992). In United States v. Miele, 989 F.2d 659, 667 (3rd Cir. 1993), the Third Circuit observed that a district court "should receive with caution and scrutinize with care drug quantity and other precise information provided by an [addict-informant] witness

before basing a sentencing determination on the information." See also United States v. Corpus, 93 F.3d 269 (7th Cir. 1996); United States v. Lee, 68 F.3d 1267 (11th Cir. 1995); United Sates v. Lawrence, 47 F.3d 1515 (11th Cir. 1995). No evidence is found in this record that Schaeffer participated in any negotiation to sell or deliver the amount included in the court's assessment of his relevant conduct. See United States v. Ynfante, 78 F.3d 677, 680-82 (D.C. Cir. 1996); United States v. Garcia, 69 F.3d 810, 818-20 (7th Cir. 1995); United States v. Davern, 970 F.2d 1490, 1493-95 (6th Cir. 1992).

C. APPLICATION OF THE OBSTRUCTION OF JUSTICE ENHANCEMENT

The trial court increased the base offense level by 2 points by finding that Schaeffer's testimony at trial, amounted to perjury and therefore, qualified under the obstruction of justice enhancement. Once again, Schaeffer vehemently objected and challenged the court's assessment on the basis of weighing the evidence and credibility concerns. Sentencing judges should make clear they have evaluated defendant's testimony in a light most favorable to defendant when determining whether defendant's base offense level should be increased for obstruction of justice under USSG Section 3C1.1. United States v. Crosby, 96 F.3d 1114, 1115 (8th Cir. 1996). A district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice... Under the perjury definition.. set out [above]. United States v. Dunnigan, 507 U.S. 87(1993). Relying on that note [USSG 3C1.1 app.n.1.], we have held that this note requires that the sentencing court refrain from imposing a Section 3C1.1 enhancement for giving perjurious testimony unless the government satisfies its burden of "clearly convincing the court that it is more likely than not that the defendant has been untruthful." United

States v. McLaughlin, 126 F.3d 130, 140 (3rd Cir. 1997). In order to warrant the 2 point enhancement for obstruction of justice, the perjury of the defendant must not only be clearly established, and supported by evidence other than a jury's having disbelieved him, but also must be sufficiently far reaching as to impose some incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury. Id. At 140. See also United States v. Morales,108 F.3d 1213 (10th Cir. 1997).

CONCLUSION

For all of the above arguments and authority, the defendant's conviction for the count of conspiracy to distribute methampheatamine should be reversed, and the matter remanded for a new trial due to the trial court's evidentiary error. In the alternative, Petitioner submits that the matter should be remanded for re-sentencing with the sentencing court being instructed that an offense level of no more than 26 and that 2 level enhancements for firearms and obstruction of justice should not be applied. Therefore, a Writ should be issued.

Respectfully Submitted this 12th day of October, 1998.

Jerry Strauss (MN # 106288)
Counsel of Record
STRAUSS & ASSOCIATES
145 Commerce at the Crossings
250 Second Avenue South
Minneapolis, MN 55401
(612) 335-8877

Attorney for Petitioner

UNITED STATES DISTRICT COURT
District of South Dakota
Western Division

UNITED STATES OF AMERICA

v.

DANIEL ROSS SCHAEFFER
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(for Offenses Committed On or After November 1, 1987)
Case Number
5:96CR50097-001
Robin L. Zephier
Defendant's Attorney

THE DEFENDANT:
[] Pleaded guilty to count(s)
[] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.
[x] Was found guilty on Count I of the Indictment after a plea of not guilty.

Title & Section Numbers	Nature of Offense	Concluded	Count
21 U.S.C. § § 841 (a)(1), 846	Conspiracy to Distribute Controlled Substance	11/21/1996	I

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)
[] Count(s) (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: 503-76-5457
Date of Birth: 12/09/56
USM No.: 10354-073

November 25, 1997
Date of Imposition of Sentence

Mailing Address
Richland Park
Highway 79, Lot 119
Rapid City, SD 57701

/s/
Richard H. Battey,
Chief Judge

Residence Address
Richland Park
Highway 79, Lot 119
Rapid City, SD 57701

11-25-97
Date

Defendant: DANIEL ROSS SCHAEFFER
Case Number: 5:96CR50097-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

188 months

[] The Court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district.
[] at
[] as notified by the United States Marshal.

[] The defendant shall surrender for service of the sentence at the institution designated by the Bureau of Prisons,
[] before 2:00 p.m. on .
[] as notified by the United States Marshal.
[] as notified by the Probation Office or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: DANIEL ROSS SCHAEFFER
Case Number: 5:96CR50097-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with

any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer,

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: DANIEL ROSS SCHAEFFER
Case Number: 5:96CR50097-001

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall provide the probation officer access to any requested financial information;
2. The defendant shall, at the discretion of the Probation Officer/Probation Officer Assistant, participate meaningfully in the U.S. Probation Office's Community Service Project while not gainfully employed, a full-time student, or otherwise productively occupied;
3. The defendant shall not consume any alcoholic beverages nor frequent establishments whose primary business is the sale of alcoholic beverages;
4. The defendant shall not possess a firearm, destructive device, or dangerous weapon;
5. The defendant shall submit to a warrantless search of his person, residence, place of business or vehicle, at the discretion of the probation officer;
6. The defendant shall participate in a program approved by and at the direction of the United states Probation Office for treatment of substance abuse, which will include testing to determine if defendant has reverted to the use of alcohol or drugs;
7. The defendant shall reside and participate in a program of a residential substance abuse facility as instructed by his probation officer until discharged by the facility director;
8. The defendant shall reside and participate in a community corrections facility program, as directed by the probation officer, under the provisions of 18 U.S.C. § 3563(b)(12) and (22). The defendant shall be classified as a prerelease case; and

9. The defendant shall submit to a sample of his blood, breath, or urine at the discretion or upon the request of the supervising probation officer.

Defendant: DANIEL ROSS SCHAEFFER
Case Number: 5:96CR50097-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth on the Schedule of Payments.:

Count	Assessment	Fine	Restitution
I	$100.00		
Totals:	$100.00		

[] If applicable, restitution amount ordered pursuant to plea agreement ..... $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options an Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived.

[] The interest requirement is modified as follows:

RESTITUTION

[] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until . An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:			

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [] $ immediately, balance due (in accordance with C,D, or E); or

C [] not later than ; or

D [] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [] in installments (e.g. equal, weekly, monthly, quarter) of $ over a period of year(s) to commence days after the date of this judgment.

Special instructions regarding the payment of criminal monetary penalties:

[] Joint and Several

Case Number	Defendant Name	Joint & Several Amount

[] The defendant shall pay the costs of prosecution.

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

Court applied Obstruction of Justice, USSG § 3C1.1, which is a two-level enhancement.

Guideline Range Determined by the Court:

Total Offense Level: 36.

Criminal History Category: I.

Imprisonment Range: 188 to 235 months.

Supervised Release Range: 5 years mandatory.

Fine Range: $20,000 to $4,000,000.

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ n/a

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[] Partial restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

Low end of guideline range, that length meets the means of justice.

OR

[] The sentence departs from the guideline range

[] upon motion of the government, as a result of defendant's substantial assistance.

[] for the following reason(s):

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-4299SD

United States of America,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
v.	*	Court for the District
	*	of South Dakota.
Daniel Ross Schaeffer,	*	
	*	[UNPUBLISHED]
Appellant.	*	

Submitted: May 13, 1998
Filed: May 21, 1998

Before RICHARD S. ARNOLD, JOHN R. GIBSON, and FAGG, Circuit Judge.

PER CURIAM.

Daniel Ross Schaeffer was convicted of conspiracy to distribute methamphetamine Schaeffer now appeals claiming (1) the district court committed error in refusing to suppress incriminating evidence seized during postarrest and inventory searches of his motor vehicle, (2) the district court committed

error in admitting certain evidence, (3) the district court committed error in refusing to give Schaeffer's proposed entrapment and mistake of fact instructions, and (4) the Government produced insufficient evidence to support the jury's verdict. Schaeffer also raises several arguments about his sentence. After a review of the record and the parties' submissions and oral argument, we conclude the district court correctly resolved each of Schaeffer's claims. Because the appeal involves the straightforward application of settled principles of law, a discussion of the issues will serve no useful purpose. We are satisfied that no error of law appears and that none of the district court's sentence-related findings are clearly erroneous. We thus affirm Schaeffer's conviction and sentence. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.